FILED
AUG 26 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15- 0819

STATE OF WEST VIRGINIA ex rel. AMERICAN ELECTRIC POWER CO., INC.; AMERICAN ELECTRIC POWER SERVICE CORPORATION; OHIO POWER COMPANY and DOUG WORKMAN, ***Petitioners***

v.

HON. DAVID W. NIBERT, Judge of the Circuit Court of Mason County; ESTATE of BOBBY CLARY by JOY CLARY, Administrator; ESTATE of LARRY LAUDERMILT by HARRIETT LAUDERMILT, Administrator; ESTATE of FRED PARKER by NANCY PARKER, Administrator; ESTATE of JAMES STEWART by SHAWN STEWART, Administrator; ESTATE of JOAN WAMSLEY by JOHN WAMSLEY, Administrator; ESTATE of JUDITH WRIGHT by THOMAS WRIGHT, Administrator; ROBERT ALLEN; LARRY ANGEL; JOSEPH BALL; PAUL BRAMMER; ROBERT BRUCE; RONALD CAMPBELL; ANTHONY CARDILLO; DAVID CARSEY; JAMES CHAPMAN; RICK CLARY; GARY COOPER; CHARLES EHMAN; ROBERT FRAZIER; DAVID JONES; RICHARD LAMBE; TANYA LAVENDER; HARRIETT LAUDERMILT; PAUL MCDANIEL; TAMMY MULLENS; TRACY MULLENS; JOHN POFF; DON REES; ELTON RITCHIE; WILBUR ROBINSON; MICHAEL SHAW; ROGER SHORT; IVA SISSON; CARLOS STEPP; THERON SWISHER; ROY TAYLOR; PAUL THOMAS; JOAN WAMSLEY; SHAREN WAMSLEY; STEVEN WATSON; EDMOND WRIGHT; THOMAS WRIGHT; TIANNA ANGEL by TINA HUDSON, mother and next friend; TINA HUDSON; JOYCE BARCUS; AUGUSTENE BRAMMER; KACEY BURRIS; CHERYL CLARY; JANET REES; DIANA WRIGHT; LARRY ANGEL; II; TERRI BOOTH; SHAWN CARDILLO; AMY EDWARDS; JESSE EHMAN; MELISSA HAYES; ALEXIS MULLENS; ELIABETH PIERCE; HANNA RAMSBURG; DARRIN REESE; CHRISTOPHER SHAW; JOHN SISSON; ROBERT SISSON; JR.; KAREN TERRY; DON WAMSLEY; ROBIN WAMSLEY; JACOB WATSON; JEREMIAH WATSON; TERRI CARSEY; SUZANNE CHAPMAN; DIAN MCDANIEL; BRENDA POFF; CHERYL SHAW; ROBERT SISSON; VICKI TAYLOR; KAREN THOMAS; and SHEILA WATSON, ***Respondents***

VERIFIED PETITON FOR WRIT OF PROHIBITION

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2. Did the Respondent Judge err by applying R. Civ. P. 20(a) and W. Va. Code § 56-1-1(a)(1), the general venue statute, and this Court's decision in *Morris v. Crown Equipment Corp.*, 219 W. Va. 347, 633 S.E.2d 292 (2006), rather than W. Va. Code § 56-1-1a(a), the specific *forum non conveniens* statute, to Petitioners' motion to dismiss the complaint?

3. Did the Respondent Judge err by holding that any dismissal of the complaint would violate the rights of the non-West Virginia Respondents under the Privileges and Immunities Clause of the United States Constitution?

4. Did the Respondent Judge err by denying Petitioners' motion to dismiss under W. Va. Code § 56-1-1a(a) where the manner in which the eight-factor statutory test was applied would always result in denial of a motion to dismiss for *forum non conveniens*?

II. STATEMENT OF THE CASE

On August 8, 2014, Respondents filed suit in Mason County, West Virginia, alleging that exposure to fly ash at a plant in Gallia County, Ohio, has caused them a long list of medical conditions and/or resulted in death.[2] [App. 15]

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[1] The superseding of *Abbott* by statute was noted by this Court in *State ex rel. Ford Motor Co. v. Nibert*, ___ W. Va. ___, 773 S.E.2d 1 (2015).

[2] As noted in the proposed order submitted by Petitioners to the Respondent Judge:

> Based upon the alleged exposure to fly ash at the landfill in Gallia County, Ohio, the complaint asserts causes of action for wrongful death; failure to warn, eliminate, protect; negligence per se; negligence; heightened duty; strict liability; battery; fraud/fraudulent concealment; misrepresentation of a toxic substance; negligent infliction of emotional

Of the 77 Respondents named in the Complaint, only 9 Respondents are identified as residing in West Virginia.

As the suit arises from the operation of an Ohio plant, it is not surprising that 56 of the 77 Respondents reside in Ohio -- including 5 of the 6 wrongful death estates.[3] [Id.]

Likewise, all of Petitioner companies are Ohio-based and only the individual Petitioner, Mr. Workman, lives in West Virginia, but even he works in Gallia County, Ohio. [Id.]

Finally, Respondents' claims stem from exposure to fly ash in Gallia County, Ohio[4], and, thus, Ohio law must be applied.[5]

> distress; medical monitoring; and loss of consortium for a variety of conditions suffered by 50 of the plaintiffs, i.e., those asserting something other than loss of consortium claims, including, but not limited to, one or more of the following: brain cancer, lung cancer, bladder cancer, skin cancer, breast cancer, prostate cancer, ovarian cancer, colon cancer, cancer of the lymph nodes, lymphatic leukemia, thyroid cancer, COPD, emphysema, bronchitis, asthma, sleep apnea, spots on the lungs, chronic cough, chest pain, other breathing problems, skin lesions, scarring, skin discoloration, psoriasis, skin rashes, chronic itching, other skin problems, heart failure, postural orthostatic tachycardia syndrome, mitral value prolapsed, other heart problems, breast nodules, thyroid nodules, nodules in the throat, psoriatic arthritis, bladder stones, gastrointestinal problems, stomach problems, tumors of the thyroid and/or voice box, Reynaud's Disease, memory loss, and "Other harms and injuries." Complaint at ¶¶ 68-150. . . .
>
> Neither plaintiffs' complaint nor their response to defendants' motion to dismiss identifies any case in which any plaintiff has ever been awarded damages as a result of exposure to fly ash and even though the United States Environmental Protection Agency announced on December 19, 2014, that it will not regulate fly ash as a hazardous substance and will permit the use of fly ash in concrete and other construction applications, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electrical Utilities, Environmental Protection Agency (Dec. 19, 2014), plaintiffs intend to establish a causal connection between exposure to fly ash processed at the Ohio landfill and the list of health conditions identified in their complaint. . . .

[App. 242-243]

[3] The sixth wrongful death estate is located in Florida. [App. 22, 33]

[4] All 11 of the non-working direct-claim Plaintiffs, who claim at-home exposure, reside in Ohio. [App. 18, 20-22]

Accordingly, this case can and should be litigated in Gallia County, Ohio, not in Mason County, West Virginia.

On September 12, 2014, Petitioners filed their motion to dismiss. [App. 48] On January 26, 2015, Petitioners filed their notice of hearing on the motion to dismiss, with a hearing scheduled for February 27, 2015. [App. 142] On February 23, 2015, four days before the hearing, Respondents served their response to Petitioners' motion to dismiss. [App. 146]

Petitioners noted at the hearing that although Respondents argued the general venue statute, the standards under that statute had no application because Petitioners had not moved to dismiss pursuant to the general venue statute: "They also keep talking about venue. We're not raising an issue of venue. We didn't move to dismiss on the grounds of venue; we moved to dismiss on the grounds of *forum non conveniens.*" [App. 201] In response, Respondents repeated their incorrect legal argument that resolution of Petitioners' motion under W. Va. Code § 56-1-1a(a), the specific *forum non conveniens* statute, was to be resolved under W. Va. Code § 56-1-1(a)(1), the general venue statute: "They want the forum they're entitled under 56-1-1(a) . . . ." [App. 209]

Likewise, Respondents incorrectly argued that this Court's decision in *Morris v. Crown Equipment Corporation*, 219 W. Va. 347, 633 S.E.2d 292 (2006), which was a general venue case -- not a *forum non conveniens* case -- dictated denial of Petitioners' *forum non conveniens* motion: "Significantly, in Crown v. Morris, the same argument, they didn't even have any West Virginia

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[5] Syl. pt. 2, *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004)("'In general, this State adheres to the conflicts of law doctrine of lex loci delicti.' Syllabus Point 1, *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986).").

plaintiffs. Mr. Morris was from Virginia. He sued Jefferds in Charleston, but he was also allowed to sue an Ohio Defendant - just like we are - Crown, the defendant." [App. 210]

Respondents further inaccurately argued, "Our Court ruled that if a West Virginian can bring the case to discriminate against an Ohio plaintiff - like today - is constitutionally impermissible under the privileges and immunities clause. [App. 211] But the Privileges and Immunities Clause has absolutely nothing to do with the issue of *forum non conveniens*, and the Legislature amended the general venue statute, W. Va. Code § 56-1-1(a)(1) and, separately, enacted the *forum non conveniens* statute, W. Va. Code § 56-1-1a(a), both in the wake of *Morris*.

With respect to the eight statutory factors that are supposed to be the **sole test** for deciding a *forum non conveniens* motion, Respondents expressly conceded five, essentially conceded a sixth, and made arguments based on cases that have been superseded by statute.

With respect to the first factor, "Whether an alternate forum exists in which the claim or action may be tried," W. Va. Code § 56-1-1a(a)(1), Respondents conceded that Ohio is an alternative forum. [App. 211]

With respect to the third factor, "Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim," W. Va. Code § 56-1-1a(a)(3), Respondents conceded, "Sure it can." [App. 212]

With respect to the fourth factor, "The state in which the plaintiff(s) reside," W. Va. Code § 56-1-1a(a)(4), Respondents did not dispute that only 9 of the 77 plaintiffs are West Virginia residents, but argued, "you have indeed within that a Mason Countian versus a Mason Countian" [App. 213], which has nothing to do with where plaintiffs reside.

With respect to the fifth factor, "The state in which the cause of action accrued," W. Va. Code § 56-1-1a(a)(5), Respondents conceded that their causes of action arose in Ohio: "The state in which the cause of action arose. Indeed, the toxic exposure that these people were subject to . . . all occurred right over there, right across the river. That is true." [App. 213]

With respect to the eighth factor, "Whether the alternate forum provides a remedy," W. Va. Code § 56-1-1a(a)(8), Respondents conceded that a remedy exists for their claims in Ohio: "Again, both forums provide a remedy." [App. 217]

Although Respondents contested three factors at the hearing, their arguments were weak or inconsistent with the standards set forth by the Legislature in the *forum non conveniens* statute.

With respect to the second factor, "Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party," W. Va. Code § 56-1-1a(a)(2), Respondents argued, "It's difficult to see how the billions of dollars that AEP has at its disposal would be substantially unjust to move a few miles across the river." [App. 211-212] Conversely, no prejudice would be caused to have the 9 West Virginia plaintiffs pursue their cause of action, under Ohio law, with their 56 Ohio co-plaintiffs "a few miles across the river."

With respect to the sixth factor, "Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view

would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty," W. Va. Code § 56-1-1a(a)(6), Respondents stated as follows:

> The vastness of the people over in Ohio in that plant might make it a little more difficult for us to get to them because they're over in Ohio . . . .
>
> The rest of Factor 6 that I'm required to go through, the cost of obtaining willing witnesses. These people [referring to Respondents] are ready to testify[6]. . . .
>
> The possibility of a view of the premise. It's a little difficult to understand the argument about how it's going to be difficult to view the defendant's premise as a burden to them. They own the plant.[7]
>
> [T]he administrative difficulties flowing from court congestion. . . . I think the cases are like 400 for one [West Virginia] judge and 500 for another. But I submit that this Court and the Supreme Court can handle this case.
>
> As to other folks coming in, they cited to an earlier statement by me. . . . [I]ndeed, if somebody else comes down with cancer - we're not talking floodgates, as it seemed to be suggested, would be opening to clog your court. . . .
>
> The interest in having localized controversies decided with[in] the state. They cite the localized controversy over there; but, you know, these folks are West Virginia plaintiffs . . . .

[App. 214-216]

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[6] This factor has nothing to do with whether the parties are willing to testify, but the cost of obtaining the attendance of non-party witnesses.

[7] This factor has nothing to do with any inconvenience to the parties; rather, it addresses inconvenience to a West Virginia jury that would be required to be transported across the river for any view of the plant, which would not be an issue if Respondents' claims were prosecuted in Ohio.

With respect to the seventh factor, "Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation," W. Va. Code § 56-1-1a(a)(7), Respondents acknowledged that dismissing the suit in favor of an Ohio forum would avoid duplication or proliferation, but argued, "We could have just brought the nine West Virginia plaintiffs in this case and filed the case here." [App. 216-217] Of course, there is no dispute that the 9 West Virginia can join their claims with the Ohio and other plaintiffs in the Ohio court.

Respondents concluded by reiterating their erroneous arguments that the general venue statute, *Morris,* and *Abbott* compelled denial of Petitioners' *forum non conveniens* motion:

> I think where we are here is once you throw all of the vegetable soup together, it's a lot simpler. It comes down to this; you have a venue-giving defendant. 56-1-1(a) says where the defendant resides or - not in the conductive "and", in the disjunctive - or because [sic] action arose. They suggest if the cause of action arose over there, it should be over there. But our statute says "or". So where we have 56-1-1(a), the West Virginia plaintiffs can bring the case.
>
> Now, the only question is, what about the Ohio plaintiffs? Crown versus Morris decided that. It is simply unconstitutional to treat them differently . . . So we have the answer in the West Virginia statute in Crown versus Morris, privileges and immunities clause, the United States Constitution, Article 4 of the West Virginia Constitution, the Supreme Court precedents in the Milan [sic] Pharmaceuticals and Crown v. Morris. . . .

[App. 218-219]

Following the hearing, Petitioners submitted a proposed order.

With respect to the first statutory factor, Petitioners noted, "plaintiffs do not dispute that an alternative forum exists in Ohio for their claims, all of which arise out of the operation of a landfill in Gallia County, Ohio." [App. 245]

With respect to the third statutory factor, Petitioners noted, "plaintiffs do not dispute that all of the defendants are amenable to jurisdiction in Gallia County, Ohio." [Id.]

With respect to the fourth statutory factor, Petitioners noted, "plaintiffs do not dispute that only 9 of 77 complaints reside in West Virginia." [App. 246]

With respect to the fifth statutory factor, Petitioners noted, "plaintiffs do not dispute that they [their causes of action] arose in the State of Ohio." [Id.]

With respect to the eighth statutory factor, Petitioners noted, "plaintiffs do not dispute that they have remedies in Ohio." [Id.]

Finally, Petitioners noted, "Accordingly, only the second, sixth, and seventh statutory factors are disputed by plaintiffs." [Id.]

With respect to these statutory factors, Petitioners first noted:

> With respect to the second statutory factor, whether maintenance of the action in this Court would work a substantial injustice to defendants, they argue that litigating claims substantively governed by Ohio law in West Virginia, when plaintiffs' complaint involves novel theories and/or issues of first impression in the State of Ohio, particularly where unlike the State of Ohio, West Virginia does not have an intermediate appellate court to resolve those novel theories and/or issues of first impression in the State of Ohio, unlike Ohio, will cause substantial prejudice. Motion at 11. . . .
>
> In response, plaintiffs do not dispute that their claims are substantively governed by Ohio law, but argue that defendants' West Virginia lawyers and the Court can educate themselves on Ohio law; that defendants have sufficient financial resources to bear the additional costs associated; and that West Virginia courts are occasionally called upon to apply the law of other jurisdictions. Response at 11-12.

[Id.]

Petitioners then noted:

> With respect to the sixth statutory factor, the balancing of private and public interests, the statute itself provides guidance. . . .
>
> W. Va. Code § 56-1-1a(a)(6) provides, "Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the

premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." . . .

With respect to the relative ease of the sources of proof, plaintiffs do not dispute that the ease of access to sources of proof is greater in Ohio. . . .

With respect to the availability of compulsory process for attendance of unwilling witnesses, plaintiffs do not dispute that there is greater availability in Ohio. . . .
With respect to the cost of attending willing witnesses, plaintiffs do not dispute that more of the witnesses are located in Ohio. . . ..

With respect to a view of the premises, plaintiffs do not dispute that those premises are in Ohio. . . .

With respect to other practical problems, plaintiffs do not dispute that fewer practical problems would be presented in Ohio. . . .

W. Va. Code § 56-1-1a(a)(6) provides, "Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.". . .

With respect to court congestion, plaintiffs do not dispute that there are significantly fewer cases filed in Gallia County than in the Fifth Judicial Circuit, which unlike the Gallia County court, is comprised of four counties, rather than one. . . .

With respect to the interest in having localized controversies decided within the state, plaintiffs do not dispute that Ohio has an interest in deciding a controversy involving 56 of its residents for claims arising from exposure to fly ash at an Ohio landfill. . . .

With respect to the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law, plaintiffs do not dispute that the Gallia County court will be capable and competent to resolve questions regarding Ohio law because Ohio law will not be "foreign" to that court. . . .

With respect to the unfairness of burdening citizens in an unrelated forum with jury duty, plaintiffs note that 9 of the plaintiffs are from West Virginia, but "The standard" in as noted by the Court in Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co. of America, 194 W. Va. 186, 194, 460 S.E.2d 1, 9 (1994), is the "burden of imposing jury duty upon the citizens of a community which has no or very little

> relation to the litigation." See also Gulf Oil Co v. Gilbert, 330 U.S. 501, 508-09 (1947)....

[App. 246-249]

> Finally, Petitioners noted:
>
> With respect to the seventh statutory factor, whether dismissal would result in unreasonable duplication or proliferation, plaintiffs do not dispute that they can file the same complaint they filed in this Court in the alternative forum and despite earlier indications to the contrary, further indicate that they do not presently contemplate adding additional plaintiffs....

[App. 249]

Respondents, likewise, submitted a proposed order: (1) misstating this Court's decision in *Abbott* was "controlling" when it has been superseded by W. Va. Code § 56-1-1a(a); (2) incorrectly applying R. Civ. P. 20(a) and W. Va. Code § 56-1-1(a)(1), the general venue statute, and this Court's decision in *Crown Equipment* rather than W. Va. Code § 56-1-1a(a), the specific *forum non conveniens* statute, to Petitioners' motion to dismiss the complaint solely under W. Va. Code § 56-1-1a(a); (3) misstating that dismissal of the non-West Virginia Respondents would violate their rights under the Privileges and Immunities Clause of the United States Constitution; and (4) denying Petitioners' motion to dismiss under W. Va. Code § 56-1-1a(a) where the manner in which the eight-factor statutory test was applied would always result in denial of a motion to dismiss for *forum non conveniens*. [App. 261-271]

On August 5, 2015, the Respondent Judge entered an order denying Petitioners' *forum non conveniens* motion adopting the erroneous legal arguments propounded in Respondents' proposed order. [App. 1] It is from that order that Petitioners timely petition for a writ of prohibition.

III. SUMMARY OF ARGUMENT

In this case, the Respondent Judge's denial of Petitioners' *forum non conveniens* motion was clear error where he found that this Court's decision in *Abbott* was "controlling" contrary to this Court's holding in *Ford Motor* that *Abbott* has been superseded by W. Va. Code § 56-1-1a(a); where he applied R. Civ. P. 20(a), W. Va. Code § 56-1-1(a)(1), the general venue statute, and *Crown Equipment* rather than W. Va. Code § 56-1-1a(a), the specific *forum non conveniens* statute, and this Court's decision in *Ford Motor* to Petitioners' motion to dismiss the complaint under W. Va. Code § 56-1-1a(a); where he erroneously held that dismissal of the complaint would violate the rights of the non-West Virginia Respondents under the Privileges and Immunities Clause of the United States Constitution; and where he applied the eight-factor test under W. Va. Code § 56-1-1a(a) in a manner that would always result in the denial of a *forum non conveniens* motion.

The Respondent Judge's order is inconsistent with the language and purpose of W. Va. Code § 56-1-1a(a); with this Court's decision in *Ford Motor*; and with this Court's decision in *State ex rel. J.C. v. Mazzone*, ___ W. Va. ___, ___, 772 S.E.2d 336, 345 (2015) ["*J.C. II*"].

Accordingly, Petitioners request a rule to show cause issue as to why a writ of prohibition should not be granted.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioners request oral argument pursuant to R. App. P. 20 as the manner in which the Respondent Judge is applying the *forum non conveniens* statute involves issues of fundamental public importance and inconsistencies with this Court's previous decisions.

V. ARGUMENT

A. ISSUANCE OF A WRIT OF PROHIBITION IS APPROPRIATE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

Pursuant to W. Va. Code § 53-1-1, "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

While a writ of prohibition remains an extraordinary remedy, this Court has consistently reviewed decisions regarding motions to dismiss under the doctrine of *forum non conveniens* through writs of prohibition.[8]

Likewise, in this case, interlocutory review of the denial of Petitioners' motion to dismiss under W. Va. Code § 56-1-1a(a) is appropriate.

In *J.C. II*, supra at 462, 759 S.E.2d at 205, this Court set forth the standards applicable to a petition for writ of prohibition from a ruling on a motion to dismiss under W. Va. Code § 56-1-1a(a) as follows:

> In cases where a lower court is alleged to have exceeded its authority, we apply the following standard of review:
>
> > In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not

[8] See, e.g., *J.C. II, supra*; *Ford Motor, supra*; *State ex rel. North River Ins. Co. v. Chafin*, 233 W. Va. 289, 758 S.E.2d 109 (2014); *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 713 S.E.2d 356 (2011); *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 526 S.E.2d 23 (1999); *State ex rel. Mitchem v. Kirkpatrick*, 199 W. Va. 501, 485 S.E.2d 445 (1997); *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763 (1995); *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 454 S.E.2d 46 (1994); *Norfolk Southern Ry. Co. v. Maynard*, 190 W. Va. 113, 437 S.E.2d 277 (1993); *Norfolk and Western Ry. Co. v. Tsapis*, 184 W. Va. 231, 400 S.E.2d 239 (1990).

> correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, as in previous *forum non conveniens* cases reviewed by this Court on prohibition: (1) there is no procedural alternative for interlocutory appellate review other than a petition for writ of prohibition; (2) Petitioners will have been deprived of an effective remedy by the time an appealable judgment is entered; (3) the Respondent Judge's order is clearly erroneous as a matter of law; and (4) the Respondent Judge's order repeats some of the same errors this Court has addressed in previous cases, particularly with respect to the reliance upon authority superseded by W. Va. Code 56-1-1a(a).

In *Mylan, supra* at 645, 713 S.E.2d at 360–61, this Court discussed the propriety of prohibition relief arising from the resolution of venue disputes:

> In the context of disputes over venue, such as dismissal for forum non conveniens, this Court has previously held that a writ of prohibition is an appropriate remedy "to resolve the issue of where venue for a civil action lies," because "the issue of venue [has] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [ ] relief by appeal would be inadequate." *State ex rel. Huffman v. Stephens,* 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999); *see also State ex rel. Riffle v. Ranson,* 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995) ("In recent times in every case that has had a substantial legal issue regarding venue, we have recognized the importance of resolving the issue in an original action.").

That same analysis applies in the instant case.

B. STANDARD OF REVIEW.

In *Ford Motor*, *supra* at ___, 773 S.E.2d at 4-5, where some of the same legal errors made in the instant case were also present, this Court set forth the standard of review as follows:

> This Court typically reviews a circuit court's decision on venue, including forum non conveniens, under an abuse of discretion standard. *See* Syl. Pt. 3, *Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co. of Am.,* 194 W. Va. 186, 460 S.E.2d 1 (1994) ("A circuit court's decision to invoke the doctrine of forum non conveniens will not be reversed unless it is found that the circuit court abused its discretion."); *Nezan v. Aries Techs., Inc.,* 226 W. Va. 631, 637, 704 S.E.2d 631, 637 (2010) ("On the issue of forum non conveniens, we have held that the standard of review of this Court is an abuse of discretion."). The Mylan Petitioners, however, contend that this Court's review should be de novo because the circuit judges misapplied and/or misinterpreted the controlling statute. In *Riffle,* this Court explained:
>
> > The normal deference accorded to a circuit court's decision to transfer a case, Syl. pt. 3, *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.,* 194 W. Va. 186, 460 S.E.2d 1 (1994) ("[a] circuit court's decision to invoke the doctrine of *forum non conveniens* will not be reversed unless it is found that the circuit court abused its discretion"), does not apply where the law is misapplied or where the decision to transfer hinges on an interpretation of a controlling statute. *See Mildred L.M. v. John O.F.,* 192 W.Va. 345, 350, 452 S.E.2d 436, 441 (1994) ("[t]his Court reviews questions of statutory interpretation *de novo.*"). Under these circumstances, our review is plenary.

Mylan, 227 W. Va. at 645, 713 S.E.2d at 360–61. In the instant matter, because the Petitioners ask this Court to decide whether the circuit court erroneously based its decision on the *Abbott* case, rather than the forum non conveniens statute, West Virginia Code § 56–1–1a, our review is de novo. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

Accordingly, a *de novo* standard of review applies in this case.

C. THE RESPONDENT JUDGE ERRED AS A MATTER OF LAW BY DENYING PETITIONERS' MOTION TO DISMISS UNDER THE *FORUM NON CONVENIENS* STATUTE.

1. The Respondent Judge Erred by Finding That This Court's decision in *Abbott* was "Controlling" When This Court Held in *Ford Motor* That It Has Been Superseded by W. Va. Code § 56-1-1a(a).

Even though the Respondent Judge's decision in this case was rendered **after** this Court's opinion in *Ford Motor*, it contains virtually the same language as in the Ford *Motor* case:

Erroneous Ford Motor Order	AEP Order
Specifically, the circuit court found "the reasoning of *Abbott* persuasive" and "controlling."	"This Court finds the reasoning in *Abbott v. Owens-Corning Fiberglass Corp., 191 W. Va. 198, 205 (1994)* to also be persuasive, and that *Abbott* is still controlling law. *Abbott* holds that even in the case of a non-resident plaintiff, 'the doctrine of *forum non conveniens* is a drastic remedy which should be used with caution and restraint.' Even where the plaintiff is a non-resident, W.Va. Code § 56-1-1a 'does not require a court to diminish, or abolish altogether, the deference it normally affords a Plaintiff's choice of forum . . . .'" [App. 4]

This apparently occurred because Respondents submitted a proposed order to the Respondent Judge based upon the language of his order in the *Ford Motor* case. [App. 261-271]

Moreover, the Respondent Judge repeated the same error as in *Ford Motor* regarding the standard to be applied in ruling on a motion pursuant to W.Va. Code § 56-1-1a:

Erroneous Ford Motor Order	AEP Order
Thus, applying the law enunciated in *Abbott*, the court determined that the Petitioners not only "failed to provide any substantive evidence that West Virginia was substantially more inconvenient and expensive than the alternate forum[,]" but also "merely relied on conclusory allegations in their pleading."	"Therefore, a defendant seeking dismissal based upon *forum non conveniens* must prove that the case can be tried substantially more inexpensively and expeditiously in the alternative forum. . . . This proof must be supported by something more than allegations in a pleading. *Abbott.*" [App. 4]

As this Court recognized in *Ford Motor*, supra at ____, 773 S.E.2d at 6 when the Legislature adopted W.Va. Code § 56-1-1a, its provisions were made mandatory:

> This Court has previously examined the effect that the foregoing statute has on all cases involving the doctrine of forum non conveniens. In syllabus points five and six of *Mylan*, we held that:
>
> > By using the term "shall," the Legislature has mandated that courts must consider the eight factors enumerated in West Virginia Code § 56–1–1a (Supp. 2010), as a means of determining whether, in the interest of justice and for the convenience of the parties, a claim or action should be stayed or dismissed on the basis of forum non conveniens.

Plainly, the Respondent Judge erred by applying the *Abbott* standard which has been superseded by W. Va. Code § 56–1–1a and consequently, just as in *Ford Motor*, the order denying Petitioners' *forum non conveniens* motion should be set aside for that reason.

Accordingly, issuance of a rule to show cause is appropriate.

2. The Respondent Judge Erred by Applying W. Va. Code § 56-1-1(a)(1), the General Venue Statute, this Court's decision in *Crown Equipment*, and R. Civ. P. 20(a), Rather Than W. Va. Code § 56-1-1a(a), the Specific *Forum Non Conveniens* Statute, to Petitioners' Motion to Dismiss the Complaint Under W. Va. Code § 56-1-1a(a).

In addition to erroneously applying standards set forth in *Abbott* that were legislatively-abrogated when W. Va. Code § 56-1-1a(a) was enacted, the Respondent Judge also confused the standards applicable to a motion to dismiss under the general venue statute, W. Va. Code § 56-1-1(a)(1), with the mandatory standards applicable under the *forum non conveniens* statute, W. Va. Code § 56-1-1a(a). Moreover, he misapplied R. Civ. P. 20(a) and misinterpreted this Court's decision in *J.C. II.*

W. Va. Code § 56-1-1(a)(1) provides, "Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county . . .

Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof."

Here, reasoned the Respondent Judge, because one of the defendants, Doug Workman, was a resident of Mason County, and the corporate Petitioners do business in Mason County, Petitioners' motion to dismiss for *forum non conveniens* should be denied.

Specifically, the Respondent Judge's order states as follows:

> The Plaintiffs oppose the Defendants' Motion, arguing that multiple West Virginia residents have properly brought suit against a Mason County, West Virginia resident, Defendant Doug Workman, and the corporate Defendants that conduct business in Mason County, West Virginia... The Plaintiffs further argue that W. Va. Code § 56-1-1(a)(1) provides that any civil action may be brought in the circuit court of any county wherein any of the defendants may reside and, therefore, the Plaintiffs['] claims **cannot be dismissed for want of venue**. The Plaintiffs argue that the West Virginia Supreme Court of Appeals decision in Morris v. Crown Equipment Corp., 219 W. Va. 347 (2006) governs and holds that the Privileges and Immunities clause of the United States Constitution **prohibits the dismissal of the Ohio Plaintiffs whenever a West Virginia Plaintiff can bring such action and that any such dismissal would be discriminatory to the Ohio Plaintiffs, who have chosen to bring this action in West Virginia, alongside the West Virginia Plaintiffs**....
>
> The Court first recognizes that "all persons may join in one action as plaintiffs if they assert any right to relief . . . [1] arising out of the same transaction [or] occurrence ... and [2] if any question of law or fact common to all these persons will arise in the action." State ex rel. J.C. v. Mazzone, 233 W.Va. 457, 463, (2014); W.Va. R. Civ. P. 20. Next, **the Court finds that the Defendants' argument regarding *forum non conveniens* is foreclosed** by the Supreme Court's decision in Morris v. Crown Equipment Corp., 219 W. Va. 347, 356 (2006), "there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state court's under venue states when a state resident would be permitted to bring a similar suit."
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> Under that framework, the Plaintiffs' chosen venue is proper because the instant mater involves claims by nine West Virginia-resident Plaintiffs against a West Virginia-resident Defendant, and **granting the Defendants' Motion on forum non conveniens grounds would amount to an impermissible, categorical**

> **exclusion of the Ohio Plaintiffs' choice to bring their suit in West Virginia, along with other West Virginia Plaintiffs.** The Court takes note that, for over 100 years, West Virginia has "follow[ed] the venue-giving principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process." Morris, 219 W. Va. at 356, 633 S.E.2d at 301 (2006). The Court finds that the Plaintiffs have properly brought suit in West Virginia against West Virginia resident Defendant, Doug Workman. Accordingly, the Plaintiffs['] lawsuit **is properly before this Court with respect to all of the named Defendants**.

[App. 2-4] [Emphasis supplied]

The Respondent Judge's reliance on W. Va. Code § 56-1-1(a)(1) and *Crown Equipment* and the manner in which he has found them to be determinative of Petitioners' *forum non conveniens* motion are clearly wrong as a matter of law for multiple reasons.

First, Petitioners' motion was pursuant to W. Va. Code § 56-1-1a(a), the *forum non conveniens* statute, not W. Va. Code § 56-1-1(a)(1), the general venue statute, a point made repeatedly to the Respondent Judge in the proceedings below. [App. 201, 226] Petitioners never challenged Mason County as a permissible venue; rather, their motion assumed venue was otherwise proper in Mason County, but moved to dismissed pursuant to the *forum non conveniens* statute. Respondents' arguments regarding the general venue statute and *Crown Equipment* were diversionary and, unfortunately, the Respondent Judge looked at the wrong statute in deciding Petitioners' *forum non conveniens* motion.

Second, the general venue statute relied upon by the Respondent Judge was enacted by the Legislature in 2007 after *Morris*, as acknowledged by this Court in *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 125, 672 S.E.2d 255, 261 (2008) ("in *Morris* [we] construed the 2003 venue statute) (citation omitted).

In amending the general venue statute in response to *Morris*, the Legislature deleted former subjection (c) which provided, "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state . . . ." 2007 W. Va. Acts ch. 1.

The Legislature also enacted the *forum non conveniens* statute in response to *Morris*. Indeed, relative to the matter at hand and contrary to the arguments of Respondents and the rulings of the Respondent Judge, this Court stated in *Savarese*, supra at 122 n.8, 672 S.E.2d at 258 n.8:

> Subsequent to this Court's decision in *Morris v. Crown Equipment Corporation*, 219 W. Va. 347, 633 S.E.2d 292 (2006), cert. denied, 549 U.S. 1096, 127 S. Ct. 833, 166 L.Ed.2d 665 (2006), cert. denied, 549 U.S. 1096, 127 S. Ct. 833, 166 L.Ed.2d 665 (2006), which found this statute constitutionally infirm when a claim was asserted against a West Virginia defendant, the Legislature repealed W. Va. Code § 55-1-1(c) (2003) **and enacted a separate forum non conveniens statute at W. Va. Code § 56-1-1a (2007)**. As subsection (c) to W. Va. Code § 56-1-1 has been repealed, all references to W. Va. Code § 56-1-1(c) herein are to 2003 enactment.

[Emphasis supplied][9]

The Respondent Judge clearly erred when he held that because of this Court's decision in *Crown Equipment* and the general venue statute that was amended in response to *Crown Equipment,* Respondents' suit "cannot be dismissed;" the "Privileges and Immunities clause of the United States Constitution prohibits the dismissal of the Ohio Plaintiffs whenever a West Virginia Plaintiff can bring such action;" "dismissal would be discriminatory to the Ohio Plaintiffs, who have chosen to bring this action in West Virginia, alongside the West Virginia

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[9] *See also* F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH at § 12(b)(3)[4] (2012) ("In 2007 the legislature repealed W. Va. Code § 56-1-1(c) in response to a decision by the Supreme Court in Morris v. Crown Equipment . . . .") (footnote omitted).

Plaintiffs;" "Defendants' argument regarding forum non conveniens is foreclosed by the Supreme Court's decision in Morris;" and "granting the Defendants' Motion on forum non conveniens grounds would amount to an impermissible, categorical exclusion of the Ohio Plaintiffs' choice to bring their suit in West Virginia, along with other West Virginia Plaintiffs."

Finally, the Respondent Judge was clearly wrong, as a matter of law, in holding that where a West Virginia plaintiff joins with a non-resident plaintiff, the *forum non conveniens* statute has no application. This part of the Respondent Judge's order relies on this Court's decision in *State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 759 S.E.2d 200 (2014) ["*J.C. I*"], but the only issues in that case, as reflected in Syllabus Points 2 and 3, were (1) whether a resident plaintiff may join claims with a non-resident plaintiff under R. Civ. P. 20(a) and (2) whether assigning separate civil action numbers to the claims of residents and non-residents under R. Civ. P. 3(a) provided authority for substantively severing a single complaint into two or more civil actions.

As to *forum non conveniens*, however, this Court's subsequent opinion in the same case, *J.C. II*, contradicts the Respondent Judge's decision in this case. Specifically, this Court held that merely because Rule 20(a) permits the joinder of the claims of residents and non-residents does not mean that the *forum non conveniens* statute does not apply:

> We recognize that permissive joinder under Rule 20(a) is designed to expedite litigation and relieve the burden on the courts and the litigants by allowing a single suit to determine the rights and liabilities of the parties. This purpose is necessarily attenuated when considered in the context of multiple parties from multiple states who have no connection to West Virginia and whose causes of action did not arise in West Virginia. While there can be factors that favor joinder, we cannot ignore the countervailing concerns associated with litigating claims in a convenient forum.
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> The Panel acquired sufficient information from the parties to recognize the difficulties and complexities that would most assuredly arise through litigating the

claims of twenty-two non-resident plaintiff families from sixteen different states whose causes of action arose in those other states. As we have previously held,

> [t]he doctrine [of forum non conveniens] accords a preference to the plaintiff's choice of forum, but the defendant may overcome this preference by demonstrating that the forum has only a slight nexus to the subject matter of the suit and that another available forum exists which would enable the case to be tried substantially more inexpensively and expeditiously.

Syl. Pt. 3, in part, *Norfolk and Western Ry. Co. v. Tsapis,* 184 W.V a. 231, 400 S.E.2d 239 (1990). Accordingly, after considering all of the above in conjunction with the broad discretion given to the Panel "to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system [,]" we conclude that under the unique circumstances of this particular litigation, the Panel properly entertained the respondents' motion to dismiss for *forum non conveniens.*

[Footnotes omitted] Again, the Respondent Judge in the instant case committed clear error when he concluded that because the claims of residents and non-residents can be joined in a single action, there can be no relief under the *forum non conveniens* statute.

Plainly, because the Respondent Judge erred by applying the general venue statute, *Crown Equipment*, and *J.C. I*, a rule to show cause should issue and the order denying Petitioners' *forum non conveniens* motion should be set aside.

3. The Respondent Judge Erred by Ruling that Dismissing the Complaint Would Violate the Rights of the Non-West Virginia Respondents Under the Privileges and Immunities Clause of the United States Constitution.

As previously noted, another erroneous legal argument made by Respondents and incorporated into the Respondent Judge's order denying Petitioners' *forum non conveniens* motion was that to dismiss the complaint would violate the rights of the non-West Virginia Respondents under the Privileges and Immunities Clause of the United States Constitution. [App. 208-209]

It is true that in Syllabus Point 2 of *Crown Equipment*, this Court held, "Under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2, the provisions of W. Va. Code, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents." But this Court's holding in *Crown Equipment* had nothing to do with the subsequently enacted *forum non conveniens* statute.

Specifically, the question presented in *Crown Equipment* was whether the general venue statute, W. Va. Code § 56-1-1(c), barred a suit by a non-resident against a West Virginia resident in a cause of action arising outside West Virginia. This Court answered that question as follows: " A reading or application of *W. Va. Code,* 56-1-1(c) [2003] that would categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in an interstate context." *Crown Equipment*, *supra* at 355, 633 S.E.2d at 300. Only because Jefferds' actionable conduct occurred in West Virginia did this Court find that he constituted the venue-giving defendant:

> In the instant case, where a substantial part of the culpable acts or omissions of one joint tortfeasor (Jefferds) are alleged to have occurred in West Virginia, and where the culpable acts or omissions of a second joint tortfeasor (Crown) are alleged to have occurred outside West Virginia, a requirement that the plaintiff independently "establish venue" with respect to the out-of-state tortfeasor would effectively prevent joinder of the out-of-state tortfeasor.

Id. at 357, 633 S.E.2d at 302.

In the instant case, of course, none of the only West Virginia defendant's conduct was alleged to have occurred anywhere other than in Ohio. More importantly, however, the issue presented to the Respondent Judge was not whether general venue exists in West Virginia, but whether the case should be dismissed in favor of a much more convenient forum.

Respondents' Privileges and Immunities argument, adopted by the Respondent Judge, is wrong as demonstrated by this Court's opinion in *J.C. II.* There, this Court confirmed the dismissal of plaintiffs from Connecticut, Florida, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Tennessee - even though those plaintiffs had joined in an action with a West Virginia plaintiff. Obviously, if the Respondent Judge was correct in this case that the dismissal of a suit by residents of Florida, Georgia, Kentucky, Ohio, North Carolina, and Texas would violate their rights under the Privileges and Immunities Clause of the United States Constitution, then this Court's affirmance of the dismissal of claims by plaintiffs from Connecticut, Florida, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Tennessee in *J.C. II* likewise violated their constitutional rights.

Again, because the Respondent Judge applied the Privileges and Immunities Clause of the United States Constitution in an erroneous manner,[10] a rule to show cause should issue and the order denying Petitioners' forum *non conveniens motion* should be set aside.

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[10] Similarly, the Respondent Judge was under the misapprehension that the doctrine of *forum non conveniens* could not be applied to a suit where one of the plaintiffs is a resident of the forum. [App. 9] Of course, quite to the contrary, the doctrine of forum non conveniens is frequently applied when a resident's suit is filed in an inconvenient and/or inappropriate forum. *See, e.g., Davis v. Davis*, 957 A.2d 576 (D.C. 2008) (affirming *forum non conveniens* dismissal of District of Columbia resident's suit against Mississippi resident where Mississippi had more connection with matters in dispute); *Warlop v. Lernout*, 473 F. Supp. 2d 260 (D. Mass. 2007) (granting *forum non conveniens* dismissal of suit despite presence of resident class members); *Cooke v. Cooke*, 201 A.D.2d 400, 607 N.Y.S.2d 662 (1994) (affirming *forum non conveniens* dismissal of New York resident's suit against Virginia resident arising from Virginia divorce); *V.G. Marina Management Corporation v. Wiener*, 337 Ill.App.3d 691, 787 N.E.2d 344, 272 Ill. Dec. 529 (2003) (affirming dismissal of resident's suit on *forum non conveniens* grounds); *Mandell v. Bell Atlantic Nydex Mobile*, 315 N.J. Super. 273, 717 A.2d 1002 (1997) (granting *forum non conveniens* motion despite resident class members); *Silver v. Great American Insurance Company*, 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972) ("Although such residence is, of course, an important factor to be considered, Forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties."); *New Amsterdam Casualty Company v. Estes*, 353 Mass. 90, 96, 228 N.E.2d

4. The Respondent Judge Erred by Denying Petitioners' Motion to Dismiss under W. Va. Code § 56-1-1a(a) Where the Manner in Which the Eight-Factor Statutory Test was Applied Would Always Result in Denial of a Motion to Dismiss for *Forum Non Conveniens*.

As discussed, the Respondent Judge mistakenly applied the general venue statute, R. Civ. P. 20(a), *Crown Equipment*, *Abbott*, and *J.C. I*, resulting in the use of incorrect standards to determine Petitioners' *forum non conveniens* motion to the extent that the mandatory eight-factor test under W. Va. Code § 56-1-1a(a) was clearly negated.

In Syllabus Point 5 of *Mylan, supra*, this Court held, "By using the term 'shall,' the Legislature has mandated that courts **must consider** the eight factors enumerated in West Virginia Code § 56–1–1a (Supp. 2010), **as a means of determining** whether, in the interest of justice and for the convenience of the parties, a claim or action should be stayed or dismissed on the basis of *forum non conveniens.*" [Emphasis supplied]

In Syllabus Point 6 of *Mylan*, the Court held, "In all decisions on motions made pursuant to West Virginia Code § 56–1–1a (Supp. 2010), courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute."

Although the Respondent Judge's order mentions the eight factors, it does not contain the requisite findings of fact and conclusions of law contemplated by the Legislature and this Court.

For example, with respect to the first factor, "Whether an alternate forum exists in which the claim or action may be tried," W. Va. Code § 56-1-1a(a)(1), a point conceded by Respondents, the order states, "[W]hile the Court recognizes that Ohio exists as an alternative

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440, 445 (1967) (suits by a state's residents are "subject to the considerations of policy underlying the doctrine of forum non conveniens" and are not "shield[ed] . . . from the operation of that doctrine.") (citation omitted).

forum, practically speaking, alternative forums almost always exist." [App. 5] Of course, this is inaccurate and this Court's decision in *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W. Va. 666, 714 S.E.2d 223 (2011) is but one example.

With respect to the second factor, "Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party," W. Va. Code § 56-1-1a(a)(2), the Respondent Judge erroneously relied upon the presence of a West Virginia defendant and the amenability of the corporate defendants to personal jurisdiction: "The Defendants neither dispute that Defendant, Doug Workman, is a West Virginia resident, nor that the Defendants regularly transact business in West Virginia." [App. 5] Again, the general venue statute has nothing to do with applying the eight-factor test in the *forum non conveniens* statute. Petitioners identified substantial injustice related to litigating claims substantively governed by Ohio law in West Virginia, when Respondents' complaint involves novel theories and/or issues of first impression in the State of Ohio, where unlike the State of Ohio, West Virginia does not have an intermediate appellate court to resolve those novel theories and/or issues of first impression.

With respect to the third factor, "Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim," W. Va. Code § 56-1-1a(a)(3), the Respondent Judge's order only mentions it, but does not substantively address it. [App. 5] Of course, it is undisputed in the record that Ohio can exercise jurisdiction over all the Petitioners, which perhaps explains why the third factor is not substantively addressed in the order denying Petitioners' motion.

With respect to the fourth factor, "The state in which the plaintiff(s) reside," W. Va. Code § 56-1-1a(a)(4), the Respondent Judge states only that this factor "essentially yield[s] no practical advantage to either side" [App. 5] even though only 9 of 77 Respondents reside in West Virginia and that "this lawsuit involves West Virginia resident-Plaintiffs and a West Virginia resident-Defendant" [App. 5-6] even though the residency of defendants have nothing to do with "The state in which the plaintiff(s) reside."

With respect to the fifth factor, "The state in which the cause of action accrued," W. Va. Code § 56-1-1a(a)(5), the Respondent Judge's order concedes, "[I]t is undisputed that the cause of action arose in Ohio," but inexplicably states that this factor "essentially yield[s] no practical advantage to either side" because "this lawsuit involves [some] West Virginia resident-Plaintiffs and a West Virginia resident-Defendant." [App. 5-6] That fact has nothing to do with "The state in which the cause of action accrued."

With respect to the sixth factor, W. Va. Code § 56-1-1a(a)(6) provides:

> Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

With respect to "the extent to which an injury or death resulted from acts or omissions that occurred in this state," the Respondent Judge's order is silent. [App. 6-8] It is undisputed, however, that any act or omission occurred in Ohio, not West Virginia.

With respect to "the relative ease of access to sources of proof," the Respondent Judge's order states, "The Court finds that access to sources of proof does not predominate in the Defendants' favor, and that the Defendants have failed to offer anything more than conclusory allegations on this factor. . . . Each state has well-established and similar subpoena procedures that can be employed, if necessary, to procure and compel out-of-state witness appearances, if necessary, and gather evidence." [App. 6]

With respect to the "availability of compulsory process for attendance of unwilling witnesses," which is a mandatory factor, the Respondent Judge's order fails to substantively address the factor other than noting that both States have subpoena procedures and concluding that the issue "does not predominate in Defendants' favor." [App. 6] Of course, the Respondent Judge's order does not reference R. Civ. P. 45(b)(2) which clearly states, "A subpoena may be served at any place within the State." So, it is unclear how the availability of compulsory process for attendance of unwilling witnesses . . . does not predominate in Defendants' favor" when Respondents have conceded that many non-party witnesses reside in Ohio and, accordingly, will not be subject to West Virginia's compulsory process.

With respect to "the cost of obtaining attendance of willing witnesses," the Respondent Judge's order merely states, "the Defendants offer only a conclusory statement that the 'cost of obtaining the attendance of willing witnesses is higher than it would be if the cases were being litigated in Ohio,' but they offer no explanation as to how or to what extent the litigation costs

would be higher in this forum." [App. 7] Although as the Respondent Judge notes, there is "close geographic proximity between Mason County, West Virginia and the Gavin Landfill" [Id.], the cost of Ohio witnesses to attend a trial in West Virginia will be greater.

With respect to the "possibility of a view of the premises," the Respondent Judge's order is silent. [App. 6-8] Unless this case is dismissed in favor of an Ohio forum, a West Virginia jury may very well need to be transported to Ohio to view the Ohio plant.

With respect to "the administrative difficulties flowing from court congestion," the Respondent Judge's order does not refute the statistics presented by Petitioners substantiating that the Mason County docket is much more congested than the Gallia County docket, but summarily concludes, "The Court is in the best position to determine the manageability of its docket and finds that it is more than capable of handling this matter." [App. 7]

With respect to "the interest in having localized controversies decided within the state," the Respondent Judge's order does not contest that all of Respondents' causes of action arose in Ohio and must be decided under Ohio law. Rather, the order simply states, "The Court is not persuaded by the Defendants' argument that the citizens of Mason County, West Virginia have an insufficient interest in deciding this controversy. As the Plaintiffs have pointed out, exposure to coal combustion waste is an issue that touches citizens on both sides of the Ohio River, particularly those in Mason County, West Virginia, who work and/or live in the shadow of four (4) of the Defendants' coal-fired power plants." [App. 8] Of course, all of Respondents' claims arise from alleged exposure in Ohio, not exposure because as West Virginians they "live in the shadow of four (4) of the Defendants' coal-fired power plants" only one of which is even an issue in this case.

With respect to "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law," the Respondent Judge's order states, "With respect to choice of law, should Ohio law control on any issues in this litigation, the Court is not especially daunted by its application. As a Court that essentially sits on the border of Ohio and West Virginia, this Court is regularly called upon to, and does, apply Ohio law in cases litigated before this Court." [App. 6] Petitioners do not doubt that the Respondent Judge has experience in traditional cases involving the application of Ohio law, but this is not such a case. Rather, it is unprecedented. In a separate motion to dismiss, Petitioners noted that several of Respondents' causes of action have either never been recognized under Ohio law or have been rejected. [App. 65-67] A case where it is very likely that certified questions to the Ohio Supreme Court will be necessary to determine whether many of Respondents' claims are even cognizable under Ohio law is one that should be dismissed under the *forum non conveniens* statute. The Respondent Judge's conclusion to the contrary is clearly wrong.

With respect to "the unfairness of burdening citizens in an unrelated forum with jury duty," the Respondent Judge's order is silent. Not good reason exists for a West Virginia jury to be called upon to decide a case which originated in Ohio, must be decided under Ohio law, and involves only 9 of 77 plaintiffs who reside in West Virginia.

Plainly, contrary to the Respondent Judge's conclusion, "the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum" under the sixth factor in the *forum non conveniens* statute.

With respect to the seventh factor, "Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation," the Respondent Judge again erroneously relies on the general venue statute: "With respect to the Defendants' contention that dismissal would not result in unreasonable duplication or proliferation of litigation, the Court disagrees. As previously set forth, W. Va. Code § 56-1-1 makes clear that dismissal of the West Virginia Plaintiffs' claims is prohibited." [App. 8] Whether the nine West Virginia plaintiffs could maintain a suit in West Virginia is not the issue and dismissal of their suits is dictated by the *forum non conveniens* statute, not the general venue statute. Otherwise, in the second *J.C.* case, this Court would not have affirmed the dismissal under the *forum non conveniens* statute of the non-West Virginia plaintiffs.

With respect to the eighth factor, "Whether the alternate forum provides a remedy," the Respondent Judge's order concedes, "the Court recognizes that Ohio exists as an alternative forum." [App. 5] Even though the Respondent Judge denied Petitioners' motion to dismiss some of Respondents' claims as stating no cause of action under Ohio law [App. 10], he inexplicably states in his order, "while, on the one hand, the Defendants allege that Ohio provides an alternative forum for this lawsuit, the Defendants also allege that the Plaintiffs' claims requires dismissal under the substantive law of that same Ohio forum, thereby calling into question whether Ohio actually provides a true remedy for the Plaintiffs' claims." [App. 5] Obviously, the Respondent Judge must not believe that some of Respondents' claims have no basis in Ohio law, as he has denied Petitioners' motion to dismiss those claims on that basis. Accordingly, based upon the record and the concessions of Respondents, it is undisputed that if there are remedies for Respondents' claims, those remedies exist in Ohio.

Plainly, the manner in which the Respondent Judge applied the eight-factor test in the *forum non conveniens* statute is inconsistent with its purpose, is inconsistent with its language, and is inconsistent with the decisions of this Court.

First, "an alternate forum exists in which the claim or action may be tried," which is undisputed.

Second, "maintenance of the claim or action in the courts of this state would work a substantial injustice" to Petitioners.

Third, "the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim."

Fourth, "The state in which the [majority of] plaintiff(s) reside" is Ohio.

Fifth, "The state in which the cause of action accrued" is Ohio.

Sixth, "The balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum" where "the relative ease of access to sources of proof" is greater in Ohio; the "availability of compulsory process for attendance of unwilling witnesses" is greater in Ohio; "the cost of obtaining attendance of willing witnesses" will be lower in Ohio; the "possibility of a view of the premises" is present and that premises is in Ohio; "the administrative difficulties flowing from court congestion" are fewer in Ohio; "the interest in having localized controversies decided within the state" is greater in Ohio; "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law," particularly in a case involving novel causes of action under Ohio law will be lessened if the claims are heard in Ohio; and "the unfairness of burdening citizens in an unrelated forum with jury duty" will not be an issue in Ohio.

Seventh, "[w]hether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation" will be a non-issue if all the Respondents join their claims in Ohio where the vast majority of Respondents reside.

Finally, "[w]ether the alternate forum provides a remedy" clearly preponderates in favor of Ohio because all of the causes of action arose in Ohio and if there is a remedy, such remedy must exist under Ohio law which Respondents concede control their causes of action.

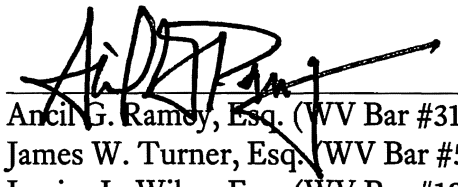
As the foregoing recitation of the eight mandatory factors for determining a *forum non conveniens* motion demonstrates, there is a good reason Respondents persuaded the Respondent Judge to apply standards that are wholly inapplicable. Because the Respondent Judge, at the Respondents' urgings, applied the wrong standards or incorrectly applied the correct standards, the order denying Petitioners' *forum non conveniens* motion was clearly wrong and should be set aside.

VI. CONCLUSION

Pursuant to R. App. P. 16(j), Petitioners respectfully request that this Court issue a rule to show cause as to why Petitioners' request for a writ of prohibition regarding the order denying their *forum non conveniens* motion should not be granted and upon full briefing and argument, reverse the order of the Circuit Court of Mason County and remand with directions that Petitioners' *forum non conveniens* motion be granted.

AMERICAN ELECTRIC POWER CO., INC.; AMERICAN ELECTRIC POWER SERVICE CORPORATION; OHIO POWER COMPANY and DOUG WORKMAN

By Counsel



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VERIFICATION

I, Ancil G. Ramey, Esq., being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Ancil G. Ramey, Esq.

Taken, subscribed, and sworn to before me this 26th day of August, 2015.

My Commission expires: February 7, 2021.

Official Seal
Notary Public, State of West Virginia
Lisa A. Ruley
Steptoe & Johnson, PLLC
1000 5th Avenue, Suite 250
Huntington, WV 25701
My commission expires February 7, 2021

Lisa A. Ruley
Notary Public

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that I served this "VERIFIED PETITION FOR WRIT OF PROHIBITION" and this "APPENDIX TO VERIFIED PETITION FOR WRIT OF PROHIBITION" on August 26, 2015, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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Circuit Court of Mason County
Mason County Courthouse
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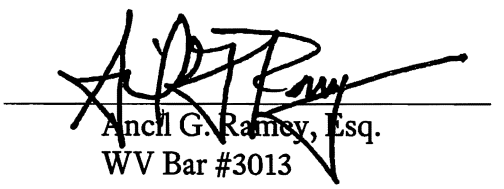

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